



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R03-OAR-2012-0368; FRL- 9836-1]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Redesignation of the West Virginia Portion of the Wheeling, WV-OH 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment and Approval of the Associated Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; supplemental.

SUMMARY: EPA is issuing a supplement to its proposed approval of the State of West Virginia's request to redesignate the West Virginia portion of the Wheeling, WV-OH fine particulate matter (PM_{2.5}) nonattainment area (Wheeling Area or Area) to attainment for the 1997 annual PM_{2.5} national ambient air quality standard (NAAQS). This supplemental proposal revises and expands the basis for proposing approval of the State's request in light of developments since EPA issued its initial proposal on December 11, 2012. This supplemental proposal addresses the effects of the decision of the United States Court of Appeals for the District of Columbia (D.C. Circuit Court) on January 4, 2013 to remand to EPA two final rules implementing the PM_{2.5} NAAQS. EPA is seeking comment only on the issues raised in this supplemental proposal and is not reopening for comment other issues raised in its prior proposal.

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID Number **EPA-R03-OAR-2012-0368** by one of the following methods:

A. www.regulations.gov. Follow the on-line instructions for submitting comments.

B. E-mail: fernandez.cristina@epa.gov.

C. Mail: **EPA-R03-OAR-2012-0368**, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-R03-OAR-2012-0368**. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814-2182, or by e-mail at quinto.rose@epa.gov.

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I. Background

On March 8, 2012, the State of West Virginia through the West Virginia Department of Environmental Protection (WVDEP) formally submitted a request to redesignate the West Virginia portion of the Wheeling Area from nonattainment to attainment of the 1997 annual PM_{2.5} NAAQS. Concurrently, West Virginia submitted a maintenance plan for the Area as a SIP revision to ensure continued attainment throughout the Area over the next 10 years.

On December 11, 2012 (77 FR 73575), EPA published a notice of proposed rulemaking (NPR) determining that the Wheeling Area has attained the 1997 annual PM_{2.5} NAAQS and that the Area has met the requirements for redesignation under section 107(d)(3)(E) of the Clean Air Act (CAA). In the December 11, 2012 NPR, EPA proposed several actions related to the redesignation of the Area to attainment for the 1997 annual PM_{2.5} NAAQS. First, EPA proposed to approve West Virginia's request to change the legal definition of the West Virginia portion of the Wheeling Area from nonattainment to attainment for the 1997 annual PM_{2.5} NAAQS. Second, EPA proposed to approve the maintenance plan for the West Virginia portion of the Area as a revision to the West Virginia SIP because the plan meets the requirements of section 175A of the CAA. Third, EPA proposed to approve the insignificance determination for the onroad motor vehicle contribution of PM_{2.5}, nitrogen oxides (NO_x) and sulfur dioxide (SO₂) in the West Virginia portion of the Area for transportation conformity purposes. Fourth, EPA

proposed to approve the base year emissions inventory for PM_{2.5} (including condensables), SO₂ and NO_x emissions. The emissions cover the general source categories of point sources, area sources, onroad mobile sources and nonroad mobile sources. EPA received no comments in response to the December 11, 2012 NPR proposing approval of the above described redesignation request, maintenance plan, insignificance determination and the base year emissions inventory. EPA is not reopening the public comment period to submit comment on the issues addressed in the December 11, 2012 NPR.

EPA today is issuing a supplement to its December 11, 2012 NPR. This supplemental NPR addresses the recent decision of the D.C. Circuit Court which affects the proposed redesignation and which has arisen since the issuance of the NPR. The D.C. Circuit Court on January 4, 2013 remanded to EPA two final rules implementing the PM_{2.5} NAAQS. Therefore, EPA's supplemental proposal revises and expands the basis for EPA's proposed approval of West Virginia's request to redesignate the Wheeling Area to attainment for the 1997 annual PM_{2.5} NAAQS, in light of this development since EPA's initial NPR.

II. Effect of the January 4, 2013 D.C. Circuit Decision Regarding the PM_{2.5}

Implementation Under Subpart 4

A. Background

On January 4, 2013, in *Natural Resources Defense Council v. EPA*, the D.C. Circuit Court remanded to EPA the "Final Clean Air Fine Particle Implementation Rule" (72 FR 20586, April 25, 2007) and the "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})" final rule (73 FR 28321, May 16, 2008)

(collectively, “1997 PM_{2.5} Implementation Rule”). 706 F.3d 428 (D.C. Cir. 2013). The D.C. Circuit Court found that EPA erred in implementing the 1997 PM_{2.5} NAAQS pursuant to the general implementation provisions of subpart 1 of Part D of Title I of the CAA, rather than the particulate-matter-specific provisions of subpart 4 of Part D of Title I.

B. Supplemental Proposal on This Issue

In this portion of EPA’s supplemental proposal, EPA is soliciting comment on the limited issue of the effect of the D.C. Circuit Court’s January 4, 2013 ruling on the proposed redesignation. As explained below, EPA is proposing to determine that the D.C. Circuit Court’s January 4, 2013 decision does not prevent EPA from redesignating the Wheeling Area to attainment. Even in light of the D.C. Circuit Court’s decision, redesignation for this Area is appropriate under the CAA and EPA’s longstanding interpretations of the CAA’s provisions regarding redesignation. EPA first explains its longstanding interpretation that requirements that are imposed, or that become due, after a complete redesignation request is submitted for an area that is attaining the standard, are not applicable for purposes of evaluating a redesignation request. Second, EPA then shows that, even if EPA applies the subpart 4 requirements to the Wheeling Area redesignation request and disregards the provisions of its 1997 PM_{2.5} implementation rule recently remanded by the D.C. Circuit Court, the State’s request for redesignation of this Area still qualifies for approval. EPA’s discussion takes into account the effect of the D.C. Circuit Court’s ruling on the Area’s maintenance plan, which EPA views as approvable when subpart 4 requirements are considered.

1. Applicable Requirements for Purposes of Evaluating the Redesignation Request

With respect to the 1997 PM_{2.5} Implementation Rule, the D.C. Circuit Court's January 4, 2013 ruling rejected EPA's reasons for implementing the PM_{2.5} NAAQS solely in accordance with the provisions of subpart 1, and remanded that matter to EPA, so that it could address implementation of the 1997 PM_{2.5} NAAQS under subpart 4 of Part D of the CAA, in addition to subpart 1. For the purposes of evaluating West Virginia's redesignation request for the Wheeling Area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not "applicable" for the purposes of section 107(d)(3)(E) of the CAA, and thus EPA is not required to consider subpart 4 requirements with respect to the Wheeling Area redesignation. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are "applicable" and which must be approved in order for EPA to redesignate an area include only those which came due prior to a state's submittal of a complete redesignation request. *See* "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni memorandum). *See also* "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992," Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465-66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424-27, May 12, 2003); *Sierra Club v. EPA*, 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA's redesignation rulemaking applying

this interpretation and expressly rejecting Sierra Club’s view that the meaning of “applicable” under the statute is “whatever should have been in the plan at the time of attainment rather than whatever actually was in the plan and already implemented or due at the time of attainment”).¹ In this case, at the time that West Virginia submitted its redesignation request, requirements under subpart 4 were not due, and indeed, were not yet known to apply.

EPA’s view that, for purposes of evaluating the Wheeling Area redesignation, the subpart 4 requirements were not due at the time West Virginia submitted the redesignation request is in keeping with the EPA’s interpretation of subpart 2 requirements for subpart 1 ozone areas redesignated subsequent to the D.C. Circuit Court’s decision in *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). In *South Coast*, the D.C. Circuit Court found that EPA was not permitted to implement the 1997 8-hour ozone standard solely under subpart 1, and held that EPA was required under the statute to implement the standard under the ozone-specific requirements of subpart 2 as well. Subsequent to the *South Coast* decision, in evaluating and acting upon redesignation requests for the 1997 8-hour ozone standard that were submitted to EPA for areas under subpart 1, EPA applied its longstanding interpretation of the CAA that “applicable requirements,” for purposes of evaluating a redesignation, are those that had been due at the time the redesignation request was submitted. *See, e.g.*, Proposed Redesignation of Manitowoc County and Door County Nonattainment Areas (75 FR 22047, 22050, April 27, 2010). In those actions, EPA therefore did not consider subpart 2 requirements to be “applicable” for the purposes of evaluating whether the area should be redesignated under

¹Applicable requirements of the CAA that come due subsequent to the area’s submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

section 107(d)(3)(E) of the CAA.

EPA's interpretation derives from the provisions of section 107(d)(3) of the CAA. Section 107(d)(3)(E)(v) states that, for an area to be redesignated, a state must meet "all requirements 'applicable' to the area under section 110 and part D." Section 107(d)(3)(E)(ii) provides that EPA must have fully approved the "applicable" SIP for the area seeking redesignation. These two sections read together support EPA's interpretation of "applicable" as only those requirements that came due prior to submission of a complete redesignation request.

First, holding states to an ongoing obligation to adopt new CAA requirements that arose after the state submitted its redesignation request, in order to be redesignated, would make it problematic or impossible for EPA to act on redesignation requests in accordance with the 18-month deadline Congress set for EPA action in section 107(d)(3)(D) of the CAA. If "applicable requirements" were interpreted to be a continuing flow of requirements with no reasonable limitation, states, after submitting a redesignation request, would be forced continuously to make additional SIP submissions that in turn would require EPA to undertake further notice-and-comment rulemaking actions to act on those submissions. This would create a regime of unceasing rulemaking that would delay action on the redesignation request beyond the 18-month timeframe provided by the CAA for this purpose.

Second, a fundamental premise for redesignating a nonattainment area to attainment is that the area has attained the relevant NAAQS due to emission reductions from existing controls. Thus,

an area for which a redesignation request has been submitted would have already attained the NAAQS as a result of satisfying statutory requirements that came due prior to the submission of the request. Absent a showing that unadopted and unimplemented requirements are necessary for future maintenance, it is reasonable to view the requirements applicable for purposes of evaluating the redesignation request as including only those SIP requirements that have already come due. These are the requirements that led to attainment of the NAAQS. To require, for redesignation approval, that a state also satisfy additional SIP requirements coming due after the state submits its complete redesignation request, and while EPA is reviewing it, would compel the state to do more than is necessary to attain the NAAQS, without a showing that the additional requirements are necessary for maintenance.

In the context of the Wheeling redesignation, the timing and nature of the D.C. Circuit Court's January 4, 2013 decision in *NRDC v. EPA* compound the consequences of imposing requirements that come due after the redesignation request is submitted. West Virginia submitted its redesignation request on March 8, 2012, but the D.C. Circuit Court did not issue its decision remanding EPA's 1997 PM_{2.5} implementation rule concerning the applicability of the provisions of subpart 4 until January 2013.

To require West Virginia's fully-completed and long-pending redesignation request to comply now with requirements of subpart 4 that the D. C. Circuit Court announced only on January 4, 2013, would be to give retroactive effect to such requirements when the State had no notice that it was required to meet them. The D.C. Circuit Court recognized the inequity of this type of

retroactive impact in *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002),² where it upheld the D.C. District Court’s ruling refusing to make retroactive EPA’s determination that the St. Louis area did not meet its attainment deadline. In that case, petitioners urged the D.C. Circuit Court to make EPA’s nonattainment determination effective as of the date that the statute required, rather than the later date on which EPA actually made the determination. The D.C. Circuit Court rejected this view, stating that applying it “would likely impose large costs on States, which would face fines and suits for not implementing air pollution prevention plans . . . even though they were not on notice at the time.” *Id.* at 68. Similarly, it would be unreasonable to penalize West Virginia by rejecting its redesignation request for an area that is already attaining the 1997 PM_{2.5} standard and that met all applicable requirements known to be in effect at the time of the request. For EPA now to reject the redesignation request solely because the state did not expressly address subpart 4 requirements of which it had no notice, would inflict the same unfairness condemned by the D.C. Circuit Court in *Sierra Club v. Whitman*.

2. Subpart 4 Requirements and Wheeling Area’s Redesignation Request

Even if EPA were to take the view that the D.C. Circuit Court’s January 4, 2013 decision requires that, in the context of pending redesignations, subpart 4 requirements were due and in effect at the time the State submitted its redesignation request, EPA proposes to determine that the Wheeling Area still qualifies for redesignation to attainment. As explained below, EPA believes that the redesignation request for the Wheeling Area, though not expressed in terms of

² *Sierra Club v. Whitman* was discussed and distinguished in a recent D.C. Circuit Court decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass’n v. EPA*. 630 F.3d 145, 163 (D.C. Cir. 2010), rehearing denied 643 F.3d 958 (D.C. Cir. 2011), cert denied 132 S. Ct. 571 (2011).

subpart 4 requirements, substantively meets the requirements of that subpart for purposes of redesignating the area to attainment.

With respect to evaluating the relevant substantive requirements of subpart 4 for purposes of redesignating the Wheeling Area, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* Section 172(c). Subpart 4 itself contains specific planning and scheduling requirements for PM₁₀³ nonattainment areas, and under the D.C. Circuit Court’s January 4, 2013 decision in *NRDC v. EPA*, these same statutory requirements also apply for PM_{2.5} nonattainment areas. EPA has longstanding general guidance that interprets the 1990 amendments to the CAA, making recommendations to states for meeting the statutory requirements for SIPs for nonattainment areas. *See*, “State Implementation Plans; General Preamble for the Implementation of Title I of the Clear Air Act Amendments of 1990,” (57 FR 13498, April 16, 1992) (the “General Preamble”). In the General Preamble, EPA discussed the relationship of subpart 1 and subpart 4 SIP requirements, and pointed out that subpart 1 requirements were to an extent “subsumed by, or integrally related to, the more specific PM₁₀ requirements.” (57 FR 13538, April 16, 1992). EPA’s December 11, 2012 NPR for this redesignation action addressed how the Wheeling Area meets the requirements for redesignation under subpart 1. These subpart 1 requirements include, among other things, provisions for attainment demonstrations, reasonably available control measures (RACM), reasonable further progress (RFP), emissions inventories, and contingency measures.

³ PM₁₀ refers to particulates nominally 10 micrometers in diameter or smaller.

For the purposes of this redesignation, in order to identify any additional requirements which would apply under subpart 4, EPA is considering the Wheeling Area to be a “moderate” PM_{2.5} nonattainment area. Under section 188 of the CAA, all areas designated nonattainment areas under subpart 4 would initially be classified by operation of law as “moderate” nonattainment areas, and would remain moderate nonattainment areas unless and until EPA reclassifies the area as a “serious” nonattainment area. Accordingly, EPA believes that it is appropriate to limit the evaluation of the potential impact of subpart 4 requirements to those that would be applicable to moderate nonattainment areas. Sections 189(a) and (c) of subpart 4 apply to moderate nonattainment areas and include the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM₁₀, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.⁴ In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment new source review program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a prevention of significant deterioration (PSD) program after redesignation. A detailed rationale

⁴ The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed below.

for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, “Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.” *See also* rulemakings for Detroit, Michigan (60 FR 12467-12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469-20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834-31837, June 21, 1996).

With respect to the specific attainment planning requirements under subpart 4,⁵ when EPA evaluates a redesignation request under either subpart 1 and/or 4, any area that is attaining the PM_{2.5} standard is viewed as having satisfied the attainment planning requirements for these subparts. For redesignations, EPA has for many years interpreted attainment-linked requirements as not applicable for areas attaining the standard. In the General Preamble, EPA stated that: “The requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point.” *See* General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990; (57 FR 13498, 13564, April 16, 1992).

The General Preamble also explained that: “[t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans . . . provides specific requirements for contingency measures that effectively

⁵ I.e., attainment demonstration, RFP, RACM, milestone requirements, contingency measures.

supersede the requirements of section 172(c)(9) for these areas.” *Id.* EPA similarly stated in its 1992 Calcagni memorandum that, “The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.”

It is evident that even if we were to consider the D.C. Circuit Court’s January 4, 2013 decision in *NRDC v. EPA* to mean that attainment-related requirements specific to subpart 4 should be imposed retroactively⁶ and thus are now past due, those requirements do not apply to an area that is attaining the 1997 PM_{2.5} standard, for the purpose of evaluating a pending request to redesignate the area to attainment. EPA has consistently enunciated this interpretation of applicable requirements under section 107(d)(3)(E) of the CAA since the General Preamble was published more than twenty years ago. Courts have recognized the scope of EPA’s authority to interpret “applicable requirements” in the redesignation context. *See Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004).

Moreover, even outside the context of redesignations, EPA has viewed the obligations to submit attainment-related SIP planning requirements of subpart 4 as inapplicable for areas that EPA determines are attaining the standard. EPA’s prior “Clean Data Policy” rulemakings for the PM₁₀ NAAQS, also governed by the requirements of subpart 4, explain EPA’s reasoning. They describe the effects of a determination of attainment on the attainment-related SIP planning requirements of subpart 4. *See* “Determination of Attainment for Coso Junction Nonattainment

⁶ As EPA has explained above, we do not believe that the D.C. Circuit Court’s January 4, 2013 decision should be interpreted so as to impose these requirements on the states retroactively. *Sierra Club v. Whitman*, *supra*.

Area,” (75 FR 27944, May 19, 2010). *See also* Coso Junction proposed PM₁₀ redesignation, (75 FR 36023, 36027, June 24, 2010); Proposed and Final Determinations of Attainment for San Joaquin Nonattainment Area (71 FR 40952, 40954–55, July 19, 2006; and 71 FR 63641, 63643–47 October 30, 2006). In short, EPA in this context has also long concluded that to require states to meet superfluous SIP planning requirements is not necessary and not required by the CAA, so long as those areas continue to attain the relevant NAAQS.

In its December 11, 2012 NPR for this action, EPA proposed to determine that the Wheeling Area has attained the 1997 PM_{2.5} NAAQS and therefore meets the attainment-related plan requirements of subpart 1. Under its longstanding interpretation, EPA is proposing to determine here that the Area also meets the attainment-related plan requirements of subpart 4.

Thus, EPA is proposing to conclude that the requirements to submit an attainment demonstration under 189(a)(1)(B), a RACM determination under section 172(c)(1) and section 189(a)(1)(c), and a RFP demonstration under 189(c)(1) are satisfied for purposes of evaluating the redesignation request.

3. Subpart 4 and Control of PM_{2.5} Precursors

The D.C. Circuit Court in *NRDC v. EPA* remanded to EPA the two rules at issue in the case with instructions to EPA to re-promulgate them consistent with the requirements of subpart 4. The D.C. Circuit Court’s opinion raises the issue of the appropriate approach to addressing PM_{2.5} precursors in this and future EPA actions. While past implementation of subpart 4 for PM₁₀ has allowed for control of PM₁₀ precursors such as NO_x from major stationary, mobile, and area

sources in order to attain the standard as expeditiously as practicable, CAA section 189(e) specifically provides that control requirements for major stationary sources of direct PM₁₀ shall also apply to PM₁₀ precursors from those sources, except where EPA determines that major stationary sources of such precursors “do not contribute significantly to PM₁₀ levels which exceed the standard in the area.”

EPA’s 1997 PM_{2.5} Implementation Rule, remanded by the D.C. Circuit Court, contained rebuttable presumptions concerning certain PM_{2.5} precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002, EPA provided, among other things, that a state was “not required to address VOC [and NH₃] as . . . PM_{2.5} attainment plan precursor[s] and to evaluate sources of VOC [and NH₃] emissions in the State for control measures.” EPA intended these to be rebuttable presumptions. EPA established these presumptions at the time because of uncertainties regarding the emission inventories for these pollutants and the effectiveness of specific control measures in various regions of the country in reducing PM_{2.5} concentrations. EPA also left open the possibility for such regulation of NH₃ and VOC in specific areas where that was necessary.

The D.C. Circuit Court in its January 4, 2013 decision made reference to both section 189(e) and 40 CFR 51.1002, and stated that, “In light of our disposition, we need not address the petitioners’ challenge to the presumptions in [40 CFR 51.1002] that volatile organic compounds and ammonia are not PM_{2.5} precursors, as subpart 4 expressly governs precursor presumptions.” *NRDC v. EPA*, at 27, n.10.

Elsewhere in the D.C. Circuit Court’s opinion, however, the Court observed: “NH₃ is a precursor to fine particulate matter, making it a precursor to both PM_{2.5} and PM₁₀. For a PM₁₀ nonattainment area governed by subpart 4, a precursor is presumptively regulated. *See* 42 U.S.C. § 7513a(e) [section 189(e)].” *Id.* at 21, n.7.

For a number of reasons, EPA believes that its proposed redesignation of the Wheeling Area is consistent with the D.C. Circuit Court’s decision on this aspect of subpart 4. First, while the D.C. Circuit Court, citing section 189(e), stated that “for a PM₁₀ area governed by subpart 4, a precursor is ‘presumptively regulated,’” the D.C. Circuit Court expressly declined to decide the specific challenge to EPA’s 1997 PM_{2.5} implementation rule provisions regarding NH₃ and VOC as precursors. The D.C. Circuit Court had no occasion to reach whether and how it was substantively necessary to regulate any specific precursor in a particular PM_{2.5} nonattainment area, and did not address what might be necessary for purposes of acting upon a redesignation request.

However, even if EPA takes the view that the requirements of subpart 4 were deemed applicable at the time the state submitted the redesignation request, and disregards the implementation rule’s rebuttable presumptions regarding NH₃ and VOC as PM_{2.5} precursors, the regulatory consequence would be to consider the need for regulation of all precursors from any sources in the area to demonstrate attainment and to apply the section 189(e) provisions to major stationary sources of precursors. In the case of Wheeling Area, EPA believes that doing so would not affect the approvability of the proposed redesignation of the Area for the 1997 PM_{2.5} standard.

The Wheeling Area has attained the standard without any specific additional controls of NH₃ and VOC emissions from any sources in the area.

Precursors in subpart 4 are specifically regulated under the provisions of section 189(e), which requires, with important exceptions, control requirements for major stationary sources of PM₁₀ precursors.⁷ Under subpart 1 and EPA's prior implementation rule, all major stationary sources of PM_{2.5} precursors were subject to regulation, with the exception of NH₃ and VOC. Thus we must address here whether additional controls of NH₃ and VOC from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the Wheeling Area for the 1997 PM_{2.5} standard. As explained below, we do not believe that any additional controls of NH₃ and VOC are required in the context of this redesignation.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538-13542. With regard to precursor regulation under section 189(e), the General Preamble explicitly stated that control of VOCs under other CAA requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). *See* 57 FR 13542. EPA in this supplemental proposal proposes to determine that the West Virginia SIP has met the provisions of section 189(e) with respect to NH₃ and VOCs as precursors. This proposed supplemental determination is based on our findings that (1) the Wheeling Area contains no major stationary sources of NH₃, and (2) existing major stationary sources of VOC are

⁷ Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available.

adequately controlled under other provisions of the CAA regulating the ozone NAAQS.⁸ In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignation of the Wheeling Area, which is attaining the 1997 annual PM_{2.5} standard, at present NH₃ and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 annual PM_{2.5} standard in the Wheeling Area. *See* 57 FR 13539-42.

EPA notes that its 1997 PM_{2.5} implementation rule provisions in 40 CFR 51.1002 were not directed at evaluation of PM_{2.5} precursors in the context of redesignation, but at SIP plans and control measures required to bring a nonattainment area into attainment of the 1997 PM_{2.5} NAAQS. By contrast, redesignation to attainment primarily requires the area to have already attained due to permanent and enforceable emission reductions, and to demonstrate that controls in place can continue to maintain the standard. Thus, even if we regard the D.C. Circuit Court's January 4, 2013 decision as calling for "presumptive regulation" of NH₃ and VOC for PM_{2.5} under the attainment planning provisions of subpart 4, those provisions in and of themselves do not require additional controls of these precursors for an area that already qualifies for redesignation. Nor does EPA believe that requiring West Virginia to address precursors differently than they have already would result in a substantively different outcome.

Although, as EPA has emphasized, its consideration here of precursor requirements under subpart 4 is in the context of a redesignation to attainment, EPA's existing interpretation of

⁸ The Wheeling Area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology regulations (45CSR21) and various on-road and non-road motor vehicle control programs.

subpart 4 requirements with respect to precursors in attainment plans for PM₁₀ contemplates that states may develop attainment plans that regulate only those precursors that are necessary for purposes of attainment in the area in question, i.e., states may determine that only certain precursors need be regulated for attainment and control purposes.⁹ Courts have upheld this approach to the requirements of subpart 4 for PM₁₀.¹⁰ EPA believes that application of this approach to PM_{2.5} precursors under subpart 4 is reasonable. Because the Wheeling Area has already attained the 1997 annual PM_{2.5} NAAQS with its current approach to regulation of PM_{2.5} precursors, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. Even if the D.C. Circuit Court's decision is construed to impose an obligation, in evaluating this redesignation request, to consider additional precursors under subpart 4, it would not affect EPA's approval here of West Virginia's request for redesignation of the Wheeling Area. In the context of a redesignation, the Area has shown that it has attained the standard. Moreover, the State has shown and EPA has proposed to determine that attainment in this Area is due to permanent and enforceable emissions reductions on all precursors necessary to provide for continued attainment. It follows logically that no further control of additional precursors is necessary. Accordingly, EPA does not view the January 4, 2013 decision of the D.C. Circuit Court as precluding redesignation of the Wheeling Area to attainment for the 1997 PM_{2.5} NAAQS at this time.

⁹ See, e.g., "Approval and Promulgation of Implementation Plans for California – San Joaquin Valley PM₁₀ Nonattainment Area; Serious Area Plan for Nonattainment of the 24-Hour and Annual PM₁₀ Standards," 69 FR 30006 (May 26, 2004) (approving a PM₁₀ attainment plan that impose controls on direct PM₁₀ and NO_x emissions and did not impose controls on SO₂, VOC, or ammonia emissions).

¹⁰ See, e.g., *Assoc. of Irrigated Residents v. EPA et al.*, 423 F.3d 989 (9th Cir. 2005).

In summary, even if West Virginia were required to address precursors for the Wheeling Area under subpart 4 rather than under subpart 1, as interpreted in EPA's remanded PM_{2.5} implementation rule, EPA would still conclude that the area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v) of the CAA.

4. Maintenance Plan and Evaluation of Precursors

With regard to the redesignation of West Virginia, in evaluating the effect of the D.C. Circuit Court's remand of EPA's implementation rule, which included presumptions against consideration of VOC and ammonia as PM_{2.5} precursors, EPA in this supplemental proposal is also considering the impact of the decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv) of the CAA. To begin with, EPA notes that the Area has attained the 1997 annual PM_{2.5} standard and that the State has shown that attainment of that standard is due to permanent and enforceable emission reductions.

In the December 11, 2012 NPR, EPA proposed to determine that the State's maintenance plan shows continued maintenance of the standard by tracking the levels of the precursors whose control brought about attainment of the 1997 annual PM_{2.5} standard in the Wheeling Area. EPA therefore, believes that the only additional consideration related to the maintenance plan requirements that results from the D.C Circuit Court's January 4, 2013 decision, is that of assessing the potential role of NH₃ and VOC in demonstrating continued maintenance in this Area. Based upon documentation provided by the State and supporting information, EPA believes that the maintenance plan for the Wheeling Area need not include any additional

emission reductions of NH₃ or VOC in order to provide for continued maintenance of the standard.

First, as noted above in EPA's discussion of section 189(e), VOC emission levels in this Area have historically been well-controlled under SIP requirements related to ozone and other pollutants. Second, total NH₃ emissions throughout the Wheeling Area are very low, estimated to be less than 800 tons per year. *See* Table 2. This amount of NH₃ emissions appears especially small in comparison to the total amounts of SO₂, NO_x, and even direct PM_{2.5} emissions from sources in the Area. Third, as described below, available information shows that no precursor, including NH₃ and VOC, is expected to increase over the maintenance period so as to interfere with or undermine the State's maintenance demonstration.

West Virginia's maintenance plan shows that emissions of direct PM_{2.5}, SO₂, and NO_x are projected to decrease by 2,529 tons per year (tpy), 35,616 tpy, and 20,581 tpy, respectively, over the maintenance period. *See* Table 1. In addition, emissions inventories used in the regulatory impact analysis (RIA) for the 2012 PM_{2.5} NAAQS show that VOC and NH₃ emissions are projected to decrease by 2,209 tpy between 2007 and 2020. NH₃ emissions are projected to increase by 59 tpy between 2007 and 2020. *See* Table 2. Given that the Wheeling Area is already attaining the 1997 PM_{2.5} NAAQS even with the current level of emissions from sources in the Area, the downward trend of emissions inventories would be consistent with continued attainment. Indeed, projected emissions reductions for the precursors that the State is addressing for purposes of the 1997 PM_{2.5} NAAQS indicate that the Area should continue to attain the NAAQS following the precursor control strategy that the State has already elected to pursue.

Even if VOC and ammonia emissions were to increase unexpectedly between 2007 and 2020, the overall emissions reductions projected in direct PM_{2.5}, SO₂, and NO_x would be sufficient to offset any increases. For these reasons, EPA believes that local emissions of all of the potential PM_{2.5} precursors will not increase to the extent that they will cause monitored PM_{2.5} levels to violate the 1997 PM_{2.5} standard during the maintenance period.

Table 1. Comparison of 2008, 2015, 2022 SO₂, NO_x, and Direct PM_{2.5} Emission Totals in tons per year (tpy) for the Wheeling Nonattainment Area

| | SO ₂ | NO _x | PM _{2.5} |
|-----------------------------------|-----------------|-----------------|-------------------|
| 2008 | 67,103 | 35,971 | 6.001 |
| 2015 | 36,843 | 16,204 | 3,436 |
| 2022 | 31,487 | 15,390 | 3,472 |
| Decrease from 2008 to 2022 | 35,616 | 20,581 | 2,529 |

Table 2. Comparison of 2007 and 2020 VOC and Ammonia Emission Totals by Source Sector (tpy) for the Wheeling Nonattainment Area¹¹

| Sector | VOC | | | NH ₃ | | |
|----------------|--------------|--------------|----------------------|-----------------|------------|----------------------|
| | 2007 | 2020 | Net Change 2007-2020 | 2007 | 2020 | Net Change 2007-2020 |
| Point | 396 | 402 | 6 | 89 | 186 | 97 |
| Area | 1,686 | 1,651 | -35 | 532 | 538 | 6 |
| Nonroad | 999 | 514 | -485 | 1 | 1 | 0 |
| On-road | 2,469 | 774 | -1,695 | 86 | 42 | -44 |
| Fires | 70 | 70 | 0 | 5 | 5 | 0 |
| Total | 5,621 | 3,412 | -2,209 | 713 | 772 | 59 |

In addition, available air quality modeling analyses show continued maintenance of the standard during the maintenance period. The current air quality design value for the Area is 13.0 micrograms per cubic meter (µg/m³) (based on 2009-2011 air quality data), which is well below

¹¹ These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 PM_{2.5} NAAQS. NH₃ increases are due to some (~5%) increase in fertilizer application, but mostly from EGU, and with huge SO₂ (point) reductions (88,229 in 2007 and 14,285 in 2020) would offset any increases.

the 1997 annual PM_{2.5} NAAQS of 15 µg/m³. Moreover, the modeling analysis conducted for the RIA for the 2012 PM_{2.5} indicates that the design value for this Area is expected to continue to decline through 2020. In the RIA analysis, the 2020 modeled design value for the Wheeling Area is 8.4 µg/m³. Given that precursor emissions are projected to decrease through 2020, it is reasonable to conclude that monitored PM_{2.5} levels in this Area will also continue to decrease in 2020.

Thus, EPA believes that there is ample justification to conclude that the Wheeling Area should be redesignated, even taking into consideration the emissions of other precursors potentially relevant to PM_{2.5}. After consideration of the D.C. Circuit Court's January 4, 2013 decision, and for the reasons set forth in this supplemental notice, EPA continues to propose approval of West Virginia's maintenance plan and its request to redesignate the Wheeling Area to attainment for the 1997 annual PM_{2.5} standard.

III. Ammonia and Volatile Organic Compound Comprehensive Emissions Inventory

EPA in this proposal also addresses the State's submission that provides additional information concerning NH₃ and VOC emissions in the area in order to meet the emissions inventory requirement of section 172(c)(3) of the CAA. Section 172(c)(3) of the CAA requires states to submit a comprehensive, accurate, and current emissions inventory for the attainment area. For purposes of the PM_{2.5} NAAQS, this emissions inventory should address not only direct emissions of PM_{2.5}, but also emissions of all precursors with the potential to participate in PM_{2.5} formation, i.e., SO₂, NO_x, VOC and NH₃.

In the December 11, 2012 NPR (77 FR 73575), EPA proposed to approve the emissions inventory information requirement for the Wheeling Area. On June 24, 2013, West Virginia supplemented its submittal with the 2008 emission inventories for NH₃ and VOC. The additional emission inventories information provided by the State addresses emissions of NH₃ and VOC from the general source categories of point sources, area sources, onroad mobile sources, and nonroad sources. *See* Table 3. The state-submitted inventories were based on the data that West Virginia certified and submitted to the 2008 National Emissions Inventory (NEI) that is available at <http://www.epa.gov/ttn/chief/net/2008inventory.html> . The NEI is a comprehensive and detailed estimate of air emissions of both criteria and hazardous air pollutants from all air emissions sources. The NEI is prepared every three years by EPA based primarily upon emission estimates and emission model inputs provided by State, Local and Tribal air agencies.

The NEI point data category contains emission estimates for sources that are individually inventory and located at a fixed, stationary location. Point sources include large industrial facilities and electric power plants. The NEI nonpoint data category contains emissions estimates for sources which individually are too small in magnitude or too numerous to inventory as individual point sources. The NEI onroad and nonroad data categories contain mobile sources which are estimated for the 2008 NEI version 3 via the MOVES2010b and NONROAD models, respectively. NONROAD was run within the National Mobile Inventory Model (NMIM).

Table 3. Marshall County, Wheeling Area NH₃ and VOC Emissions (tpy) by Source Sector

| Sector | NH₃ | VOC |
|---------------|-----------------------|------------------|
| Point | 31.85 | 320.50 |
| Area | 78.90 | 2,944.99 |
| Nonroad | 0.12 | 163.45 |
| Onroad | 10.36 | 269.32 |
| Total | 121.23 | 3, 698.26 |

EPA has concluded that the 2008 NH₃ and VOC emissions inventories provided by the State are complete and as accurate as possible given the input data available for the relevant categories. EPA also believes that these inventories provide information about NH₃ and VOC as PM_{2.5} precursors in the context of evaluating redesignation of the Wheeling Area under subpart 4. Therefore, EPA is proposing to approve the NH₃ and VOC emissions inventories submitted by the State, in conjunction with the NO_x, direct PM_{2.5}, and SO₂ emissions inventories that EPA previously proposed to approve as fully meeting the comprehensive inventory requirement of section 172(c)(3) of the CAA for the Wheeling Area for the 1997 annual PM_{2.5} standard. *See* (77 FR 7357, December 11, 2012). Since EPA's prior proposal addressed other precursor emissions inventories, EPA in this supplemental proposal is seeking comment only with respect to the additional inventories for NH₃ and VOC that West Virginia has submitted.

IV. Proposed Action

After fully considering the D.C. Circuit Court's decision in *NRDC v. EPA* on EPA's 1997 PM_{2.5} Implementation rule, EPA in this supplemental notice is proposing to proceed with approval of the request to redesignate the Wheeling Area to attainment for the 1997 annual PM_{2.5} NAAQS and the associated maintenance plan. EPA in this supplemental notice is also proposing to approve the 2008 NH₃ and VOC emissions inventory as meeting, in conjunction with the direct PM_{2.5}, NO_x and SO₂ emissions inventory that EPA previously proposed to approve, the

comprehensive emissions inventory requirements of section 172(c)(3) of the CAA. In addition, EPA in this supplemental action is proposing to proceed with the approval of the insignificance determination of the onroad motor vehicle contribution of PM_{2.5}, NO_x and SO₂. EPA is seeking comment only on the issues raised in its supplemental proposal, and is not re-opening comment on other issues addressed in its prior proposal.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule pertaining to the redesignation of the West Virginia portion of the Wheeling WV-OH 1997 annual PM_{2.5} nonattainment area, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Parts 52 and 81

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: July 8, 2013.

W.C. Early,
Acting Regional Administrator,
Region III.

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